

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff/Respondent,

v.

CARLOS VARELA-VILLA,  
Defendant/Petitioner.

NO. CR-08-6066-LRS  
(NO. CV-10-5003-LRS)

**ORDER DENYING VARELA-VILLA'S  
MOTION UNDER 28 U.S.C. § 2255  
TO VACATE SENTENCE**

BEFORE THE COURT is Carlos Varela-Villa's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 51).

**I. BACKGROUND**

On March 19, 2009, Mr. Varela-Villa pleaded guilty to being an Alien in the United States After Deportation in violation of 8 U.S.C. § 1326 pursuant to the parties' written plea agreement. Applying the 18 U.S.C. § 3553(a) factors, the Court sentenced Mr. Varela-Villa on June 23, 2009, to forty-one months in prison and a three-year term of supervised release. The base offense level of 8 was increased by 16 levels pursuant to § 2L1.2 for having a 1996 conviction for second degree child molestation offense, a crime of violence. Pursuant to the Plea Agreement, the United States agreed to recommend a 2-level downward

1 adjustment for acceptance of responsibility and an additional 1-level  
2 downward adjustment for timely notifying the United States of an  
3 intention to enter a guilty plea. As a result, the total adjusted  
4 offense level was 21, and the Defendant fell within Criminal History  
5 Category II. The guideline sentencing range was 41-51 months with a  
6 statutory maximum of 20 years. Defense objections were raised as to the  
7 classification of his prior conviction for second degree child  
8 molestation as a crime of violence. Varela-Villa's Motion for Downward  
9 Departure, based upon the argument that the +16 level enhancement was  
10 incorrect and calculation of a guideline range should be 15-21 months was  
11 denied. Mr. Varela-Villa has not appealed this sentence.

12 On January 5, 2010, Mr. Varela-Villa filed his first §2255 motion  
13 challenging his sentence based on ineffective counsel, and more  
14 particularly counsel's alleged failure to raise the issue of  
15 deportability as a mitigating circumstance at sentencing. Mr. Varela-  
16 Villa requests the Court to grant "a two point downward departure from  
17 his sentence." Ct. Rec. 51.

18 Pursuant to Rule 4(b) of the Rules Governing Section 2255  
19 Proceedings for the United States District Courts, the Court must examine  
20 a Section 2255 motion and the record to determine whether summary  
21 dismissal is warranted. Rule 4(b), 28 U.S.C. foll. § 2255. "If it  
22 plainly appears from the motion, any attached exhibits, and the record  
23 of prior proceedings that the moving party is not entitled to relief,  
24 the judge must dismiss the motion..." *Id.*

25 The Rules regarding section 2255 proceedings state that the Court  
26 may summarily order dismissal of a § 2255 motion without service upon the

1 United States Attorney only "if it plainly appears from the face of the  
2 motion and any annexed exhibits and the prior proceedings in the case  
3 that the movant is not entitled to relief in the district court." Rule  
4 4(a), RULES-SECTION 2255 PROCEEDINGS. Thus, when a movant fails to state a  
5 claim upon which relief can be granted or when the motion is incredible  
6 or patently frivolous, the district court may summarily dismiss the  
7 motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989);  
8 *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

9 Viewing the record under this standard and for the following  
10 reasons, the Court finds that summary dismissal is appropriate as the  
11 record conclusively shows that Mr. Varela-Villa is not entitled to  
12 relief.

## 13 II. DISCUSSION

14 28 U.S.C. § 2255 provides, in part:

15 A prisoner in custody under sentence of a court  
16 established by Act of Congress claiming the right to  
17 be released upon the ground that the sentence was  
18 imposed in violation of the Constitution or laws of  
19 the United States, or that the court was without  
20 jurisdiction to impose such sentence, or that the  
sentence was in excess of the maximum authorized by  
law, or is otherwise subject to collateral attack,  
may move the court which imposed the sentence to  
vacate, set aside or correct the sentence.

### 21 A. PREJUDICIAL ERROR

22 If the Court is deciphering Mr. Varela-Villa's argument correctly,  
23 he argues that the Court did not properly account for his status as a  
24 deportable alien, which he argues is a mitigating factor in determining  
25 his sentence. Mr. Varela-Vila argues that his status as a deportable  
26 alien leads to harsher treatment by the bureau of Prisons. Although Mr.

1 Varela-Villa discusses case law pertaining to deportable aliens, he does  
2 not argue that this Court failed to properly consider all of the 18  
3 U.S.C. § 3553(a) factors as it is required to. The Court finds this  
4 ground without merit.

5 **B. INEFFECTIVE ASSISTANCE OF COUNSEL**

6 Mr. Varela-Villa argues that his counsel, at the sentencing stage,  
7 failed to raise deportability as a mitigating factor at sentencing or to  
8 advise him of this "form of relief." Ct. Rec. 51, at 6. Mr. Varela-Villa  
9 appears to argue (based on his case law analysis) that his lawyer should  
10 have argued that his status as a deportable alien is a "mitigating  
11 factor" because as a deportable alien, he will not be eligible for "pre  
12 release custody and minimum security confinement." Ct. Rec. 51, at 2.

13 The test for ineffective assistance of counsel claims is set forth  
14 in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674  
15 (1984), and in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d  
16 203 (1985). Under *Strickland*, to establish a claim of ineffective  
17 assistance of counsel, Mr. Varela-Villa must show (1) grossly deficient  
18 performance by his counsel, and (2) resultant prejudice. 466 U.S. at 687,  
19 104 S.Ct. 2052.

20 The Court notes that defense counsel, in the sentencing memorandum  
21 (Ct. Rec. 41), thoroughly discussed all factors deemed pertinent,  
22 including all six 18 U.S.C. §3553 (a) factors. There is no showing that  
23 counsel's efforts were not those of a reasonably competent practitioner.  
24 Mr. Varela-Villa points to no deficient performance by counsel which  
25 prejudiced his case or deprived him of an opportunity to have a fair  
26 sentencing. Mr. Varela-Villa "must show that there is a reasonable

1 probability that, but for counsel's unprofessional errors, the result of  
2 the proceeding would have been different. A reasonable probability is  
3 a probability sufficient to undermine confidence in the outcome."  
4 *Strickland*, 466 U.S. at 694.

5 Whether Mr. Varela-Villa's attorney should have argued this  
6 "mitigating factor" depends on the specific circumstances of his case.  
7 A defendant's status as a deportable alien does not automatically entitle  
8 him or her to a downward departure from the sentencing guidelines.  
9 Rather, in departing downward, a sentencing court must determine, "under  
10 the facts and circumstances of each case, whether the factor takes the  
11 case outside of the 'heartland.' " *United States v. Charry Cubillos*,  
12 91 F.3d 1342, 1344 (9<sup>th</sup> Cir.1996). Additionally, a departure from the  
13 advisory sentencing guidelines based on the collateral consequences of  
14 a prisoner's status as a deportable alien, while permissible, is  
15 generally proper only where the difference in the severity of a  
16 prisoner's sentence is substantial. *Id.* at 1343-44 [emphasis added].

17 Mr. Varela-Villa has provided nothing to show that at the time of  
18 his sentencing, there was any basis for a reasonable attorney to conclude  
19 that his case fell outside of the "heartland" of cases, or that his  
20 sentence was substantially more severe because of his status as a  
21 deportable alien. Mr. Varela-Villa received the low end of the advisory  
22 sentencing guideline range. Consequently, Mr. Varela-Villa has failed  
23 to establish that a reasonably competent attorney would have sought such  
24 a departure or that there is a reasonable probability that the sentence  
25 he received would have been different if his attorney had given the  
26 assistance that he alleges should have been provided. The Court

1 concludes that Mr. Varela-Villa has not provided any evidence to convince  
2 this Court that his constitutional rights were violated.

3 **III. CONCLUSION**

4 The Court summarily dismisses the Motion without sending it to the  
5 United States Attorney for response. Accordingly,

6 **IT IS ORDERED** that:

7 1. Mr. Varela-Villa's Motion to Vacate, Set Aside, or Correct  
8 Sentence by a Person in Federal Custody, filed January 21, 2009 (**Ct. Rec.**  
9 **51**, CR-08-6066-LRS; **Ct. Rec. 1**, CV-10-5003-LRS) is **DENIED**.

10 2. The District Court Executive is directed to:

11 (a) File this Order;

12 (b) Provide a copy to Mr. Varela-Villa **AND TO** the  
13 United States Attorney for the Eastern District  
14 of Washington(Yakima); and

15 (c) **CLOSE THESE FILES**.

16 **DATED** this 12th day of March, 2010.

17  
18 **s/Lonny R. Suko**

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20 LONNY R. SUKO  
21 CHIEF UNITED STATES DISTRICT JUDGE  
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